

## Standardization and the production of justice in summary criminal courts: a post human analysis

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# STANDARDISATION AND THE PRODUCTION OF JUSTICE IN SUMMARY CRIMINAL COURTS: A POST HUMAN ANALYSIS

## **Abstract**

*Since the 1980s, successive governments have become increasingly distrustful of professional judgment in those services which remain funded by the state, including the criminal justice system. Against this background, governments sought to increase efficiency in summary criminal courts. One way that this seems to have occurred is via the use of standardised forms in case progression. During 2013, Welsh conducted empirical research in which the reliance placed on standardised case management forms became apparent. We argue, drawing on post-humanist vocabularies to inform our analytic framework, that such documents may have shifted the temporality of summary criminal justice, which has the (perhaps unintended) consequence of (further) marginalising defendant participation and limiting the types of legal issue that are litigated. These documents and processes, therefore, participate in the development of a particularised, and temporally situated, form of 'justice'.*

## **Introduction**

The election of a Conservative government in 1979 marked the beginning of a time from which British governments became ever more distrustful of professional judgment in public institutions (Le Grand, 1997), including the criminal justice system. Since 1979, British governments became increasingly concerned that lawyers were 'wasting time' and prolonging cases to maximise profit (Sommerlad, 1999). As a result, those governments (irrespective of their traditional political leanings) sought to increase efficiency in summary criminal courts.<sup>1</sup> Sanders (2010), for example, notes that New Labour adopted a regulatory, managerialist approach to criminal justice. One manifestation of a politically driven desire to increase efficiency is the use of standardised documentary forms in case progression, which operate to channel the way in which trials are conducted.

During the course of empirical research (an ethnographic case study of magistrates' courts consisting of observation and semi-structured interviews; detailed below), Welsh noted the frequency with which document based forms were used in case progression. The document that appeared to have the most influence was the case management form (CMF), which is completed at a pre-trial hearing and is used to determine which matters are in issue and parameters within which the trial will be conducted (see below).<sup>2</sup> Using the data gathered during ethnographic research, we argue that the use of the form in this context increases processes of standardisation, which demonstrates how the documentary form is capable of constructing a particular understanding of 'justice'. This supports the work of Brenneis (2006), who discusses how neoliberal<sup>3</sup> governments' distrust of public services created a desire for (further) efficiency to be both maximised and monitored through forms. The use of forms to encourage efficiency leads to generalisation of procedures, which direct the exercise of control over cases and court users, so that routinization via standardisation appears legitimate (Hosticka, 1979). Tata (2017) argues that individualisation cleans the criminal process of its impurities and presents the defendant as an active participant. However, 'bureaucratisation of decision-making...emerges in opposition to norms of 'individualised' treatment' (Tepperman, 1973: 346). Increased bureaucratisation (and therefore standardisation) means that defendants might be less able to play a distinct role in the proceedings. The reliance placed on these forms provides an example of the many practices in which neoliberalism is produced and sustained, but the forms' active role, and creative capacity, is easily overlooked.<sup>4</sup> As such, although the data obtained in this research is important, the analytic framework that has been applied is of equal importance in terms of our conclusions about the production of justice more generally. Following this, it seemed that the interpretation of data needed to be capable of addressing the active capacity of objects such as forms. As such, and rather than informing the method of data collection, post-humanist vocabularies are introduced and employed at the data analysis stage of this research. This offers an opportunity to assess and identify both the merits of using such vocabularies in interpretation of the data presented and the critical value of such approaches to criminal justice research.

Documents can readily be seen as ‘simply standing between things that really matter, giving immediate access to what they document [and denying their] mediating role’ (Hull, 2012: 252). Failing to acknowledge the materiality of forms and text thereon impedes our understanding of how particular systems and ideologies are realised. In other words, the state depends on the capacity of forms to participate in enacting a type of criminal justice which may be dissonant to a more considerate and constructive sense of justice but is, nevertheless, ‘productive’ and sustains a particular ideological order which favours efficiency and encourages the standardisation of professional practices.

An important consideration in exploring how such a conception of justice is achieved is time. Any talk of efficiency, progression, and routinization indicates a temporal texture to the enactment and maintenance of a neoliberal approach to criminal justice. Moreover, the idea that appropriate uses of time can be calculated (as demonstrated by the fee-per-case payment structure (Welsh, 2017)) suggests that forms play an integral role in the temporal determination of the deserving and undeserving. This can, it will be established, have consequences for the defendant and definitions of justice, and the authority of the state. We argue that an understanding of the specific temporality of the form is crucial if it is to be implicated in the enactment of a neoliberal species of justice; one that is temporally situated in demands for efficiency. Moreover, acknowledging the ability of the form to participate in determining the rational temporality of summary criminal proceedings enables us to problematize the neoliberalisation of justice as exclusionary.

In order to articulate the active roles of forms in enacting a temporally situated process of summary criminal proceedings and the enactment of justice, we must first indicate how post-humanist vocabularies are used in order to identify how the form helps enact a *very specific* characterisation of summary criminal justice.<sup>5</sup> As such, this paper confronts the terms ‘actors’, ‘agency’, ‘enactment’, ‘network’, and ‘relationality’; language familiar to post-humanist approaches such as actor-network theory (ANT) and new materialism. The widening of the definition of ‘actor’ in order to acknowledge the range of entities which participate in, and mediate, a particular system or process depends heavily

on the concession that nothing can be reduced to itself in isolation from contact with other things (Ahmed, 2010). In ANT terms, it is therefore important to identify the contingency of anything on a functioning network of actors relating with each other for its enactment. The closely aligned notion in new materialism is the idea that agency should similarly be considered an assemblage—a product of interaction between a number of actors and compound sources (Bennett, 2010). For the purposes of this paper, such language is relied upon to draw out the form and time from the data as elements which may otherwise be taken for granted in the story of the neoliberalisation of justice.

It is important to acknowledge the (potential) role of other actors in the process, such as the lawyers who complete the form. However, we are not concerned, in this paper, with interpretations of the form. We recognise that such reactions open up the potential for micro acts of resistance by those engaging with the form. Instead, we examine the role, and aims, of the form at a structural level and how it represents one manifestation of a neoliberal style aim of government to exercise control over the public sector. It is through that analysis that we argue the form represents an attempt to enact a temporally situated construction of justice.

We use the first part of this paper to discuss how the form is a manifestation of neoliberalism in summary criminal justice. We then begin to explore how CMFs and time are implicated in the enactment of the neoliberalisation of summary justice, informed by ethnographic research which indicates how these forms shift the conduct and functions of the legal profession. We then use a post humanist analytic frame, influenced by ANT, to examine the implicit role of the form in greater depth. We conclude by acknowledging the role of forms, and time, in producing a particular type of justice – one that is led by demands for efficiency over the needs of individual cases and parties to those cases. This appears to be a new paradigm in the process of summary criminal justice.

### **Neoliberalisation manifested through forms**

The perceived need for efficiency within summary criminal proceedings regularly features, and has historically featured, in the enactment of justice. Carlen (1976b) noted that the volume of business which

passes through the magistrates' courts means that the proceedings need to be carefully managed. This meant that police prosecutors made value judgements about which cases were worthy of being dealt with early in the day, often based on whether the defendant was pleading guilty alongside an assessment of the defendant's demeanour based on certain court accepted stereotypes (Carlen, 1976a). McBarnet was concerned about 'bureaucratic pressures pushing the police into acceptable arrest rates, lawyers into negotiating pleas, court officials into a speedy rather than necessarily a just through-put of cases' (1981: 3).<sup>6</sup> Similar findings are recorded in relation to the prevalence of plea negotiations, which are also encouraged by neoliberal-styled justice agendas that have demands for efficiency and expedition (and therefore economic measures) at their core (Alge, 2013; Mulcahy, 1994). It is, therefore, true to state that summary justice has always demanded efficiency, which has always encouraged practices that undermine the individuality of defendants' cases. We argue, however, that modern summary justice, as constructed via the form, is a particular manifestation—and production—of a neoliberal agenda which demands further efficiency and expedition through managerialism.

The impact of managerialism, and associated demands for efficiency, on the criminal justice process has been well documented by, among others, Sommerlad (1999). Reforms have encouraged lawyers to conduct cases at ever greater speed, as exemplified by policy changes advocated by *Criminal Justice: Simple, Speedy, Summary* (CJ: SSS)<sup>7</sup> and *Swift and Sure Justice*.<sup>8</sup> In the early twenty-first century, Leverick and Duff also noted 'the concern of courtroom workgroups to progress through the work of the day with minimum levels of confrontation and maximum levels of speed' (2002: 44). Darbyshire (2011) further noted in her study that District Judges favoured 'the speed of the proceedings, the *summary* nature of summary proceedings' (2011: 154). The Criminal Procedure Rules, first enacted in 2005, have also encouraged greater efficiency while increasing the ways in which criminal case progression is formally regulated. However, such initiatives have reduced lawyers' professional autonomy and ability to use discretion (Sommerlad, 1999; Cape, 2006; Welsh, 2017), which further encourages routinized approaches to summary criminal justice. The speed at which the proceedings operate coupled with low levels of publicly funded remuneration for defence lawyers means that defendants are offered fragmented access to legal services (Newman, 2013). This, coupled with the specialist knowledge

required to conduct the proceedings, allows the workgroup to routinize procedures (Castellano, 2009). Routinized approaches that are, we suggest, encouraged by the use of forms have also facilitated delegation of prosecutorial roles to legal executives in magistrates' courts (Soubise, 2017). It should be noted that the form that is the focus of this paper, the CMF, was introduced to complement the objectives of the Criminal Procedure Rules circa 2010.

This suggests that the form can be implicated in the work being done to effect rationality and calculability within criminal justice, and an interrogation of the temporal effects of the form is one means of expressing its active, rationalising, capacity. In order to do so, the assumption of time's own standardisation and rationality needs to be problematized. An initial appreciation of the multiplicity and contingency of 'time' enables one to understand the many temporal experiences of summary criminal proceedings. For example, the bureaucratic speed, insistence on hurriedness and the pinching of time available to represent a client are met by adverse feelings of slowness and anxiety for defendants while waiting for their cases to be called (Carlen, 1976a). Furthermore, the effects of time pinching may be equally felt by both prosecution and defence advocates, but the imbalanced infrastructure available to deal with this means that speed itself can be experienced differently. As such, the benefits of accelerated proceedings are principally felt by the state.

It has already been mentioned that the standardised form acts as a tonic to the increasing desire for efficiency, and the data which suggests it contributes to the routinization and rationalization of work is discussed below. To set the data in context, we must understand how the form actually performs those functions. The form requires that certain, important, principles are reduced to tick box answers. For example, two early questions on the form are: has the defendant been advised about credit for an early guilty plea? 'Yes/No' and has the defendant been advised that the trial may proceed in absence? 'Yes/No'. The two questions are matters that a) ensure that the defendant knows about the benefits of pleading guilty at an early stage in the proceedings, principally the sentence discount, and b) allow the court to proceed to trial (and charge a defendant with a further criminal offence) if he or she does not

attend. As we move through the form its questions, in the same style, whether it is accepted that the arrest was lawful, that expert evidence (if relevant) is agreed, that evidence of previous convictions is admissible, whether the transcript of interview is agreed, etc. As set out in the data below, a defendant (or lawyer) who answers any such question in the affirmative will face difficulty resiling from that answer if the need to do so should arise. As above, this paper, while acknowledging that lawyers may perform acts of resistance in the way the form is completed, seeks to examine the role of the form at a structural level rather than reactions to the form at the micro level. Building on the methodological approach articulated above, we argue that a distinction can be made between the *passive* form measuring the success of an efficient justice system and the *active* form contributing to the enactment of a deeply marginalising species of justice which inhibits both defendant participation and the development of law. The restrictive responses desired of those interacting with the form, for instance, help to create the subject position of the defendant and the legal profession.

It is via processes such as these that traditional ideas of adversarial justice in which each party is responsible for obtaining and introducing evidence are ‘subjugated to an organisational efficiency’ (Carlen, 1976a: 20). Legal ideology becomes subordinate to economic and bureaucratic ends (McBarnet, 1981). Packer’s (1968) crime control model associates volume processing with effective case disposal at whatever cost but it is also possible to link increased reliance on, and reference to, forms with Bottoms and McClean’s (1976) liberal bureaucratic model, which requires procedures that ensure justice is seen to be done—it is recorded on the form—but also requires volume processing so that the system does not become overburdened. The speed of the proceedings also creates an air of informality which ‘would seem to be rather one-sided: the defendant’s *role*...is still governed by formal procedures, but the defendant’s *rights* are greatly reduced’ (McBarnet, 1981: 140). More recently, Marsh (2016) describes magistrates’ court processes as akin to an assembly line. As such, the form’s entanglement in these procedures points to its involvement in the disintegration of the defendant as a rights-bearing and responsive actor. The role of the human defendant in the process is, therefore, no less passive in summary criminal proceedings than that of the administrating document. Moreover, the desire to routinize



proceedings further limits how defendants are represented. Consequently, the role of the form in co-opting efficiency *as* justice becomes apparent.

## **Method**

The purpose of the empirical research was to examine barriers to defendant participation in the summary criminal justice process. The objective of the research was to begin to illuminate the effect(s) of criminal justice policy on the behaviour of actors in particular geographically situated magistrates' courts.<sup>9</sup> The research therefore acknowledges the complexity of the particular case in question (Bryman, 2012) and is associated with a specific organisation or community. As such, the research takes an idiographic approach in which the findings cannot necessarily be applied regardless of time and place (*ibid.*). It is also important to acknowledge here that Welsh had formerly been a practitioner in the area of study, which had particular implications for the research design.<sup>10</sup>

The research consisted of two stages of ethnographic research; observations followed by semi-structured interviews. Conducting observation allowed the researcher to gain 'an appreciation of the culture of the social group' (*ibid.*: 66) from a greater distance than previously experienced (as a practitioner), while maintaining the benefit of being a member of the same epistemic community as participants. The equivalent of one month of observation was conducted during late 2012 and early 2013. Welsh observed a range of hearings including sentencing, bail applications, trials and case management hearings. An observation diary was analysed to identify themes and draw out examples in support of those themes.

Observation of court processes assisted in uncovering the nature of relationships between court personnel and patterns of workgroup behaviour (Baldwin, 2000). Previous experience working in these courts allowed the researcher to understand the nuances of court personnel behaviour, rather than experience a sense of 'exclusion, estrangement, and alienation' (*ibid.*: 245) from the proceedings that other non-participant observers may feel. We also believe that the risk of reactive effect was minimised by the researcher's role as a partially participating observer.<sup>11</sup> Several participants acknowledged that,

due to the researcher's previous role, they did not feel threatened by the presence of an observer. Welsh was, therefore, able to observe usual (rather than moderated) courtroom behaviour, as well as benefit from her own knowledge of the court system. Balanced against these benefits are the risks of bias and over-identification with research subjects.

Given that the aims included locating the findings in the context of policy change, Welsh followed up observations by interviewing 19 advocates (12 defence lawyers and seven prosecutors).<sup>12</sup> It was a prerequisite for participation that interviewees had been in practice during the period in which policy changes had occurred. The interviews were separated into two sections, with one set of questions about funding and another about magistrates' court practices more generally. It was important that elements of the interviews were structured in order to obtain comparable data, but respondents were also encouraged to explain their opinions as they felt appropriate. Interviewees were asked outright for their views on the use of forms in magistrates' courts, and were asked about the effect of policies designed to improve efficiency. Interviews were transcribed and a thematic analysis was conducted in order to identify themes and subthemes which were indicative of an impact on the ability of defendants to participate. The themes were identified via 'recurring motifs in the text' (Bryman, 2012: 554) that were used to categorise and organise the data. It is important to avoid overstating the findings of the research given the geographical limits apparent in the data, and the fact that all interview data 'can only be understood in the context of the interview' (Bano, 2005: 103), because it may only reflect an account of after the event rationalisations (Sommerlad, 1999). However, the data obtained is relatable to similar studies (e.g. Newman, 2013; Sommerlad, 1999; Soubise, 2017), which suggests that the propositions advanced have broader applicability across the summary criminal justice system.

It is, however, appropriate to note that while one aim of the research was to examine the relationship between demands for efficiency and the ability of defendants to participate in processes of summary justice, the observation data gathered in relation to forms was an unexpected addition to the findings. As such, this paper employs a quasi-grounded theory style of analysis, using post humanist interpretations

to move from data to theory rather than data collection being reliant on a preconceived analytic construct (Willig, 2013).

While post humanist analyses have previously been applied to other types of legal process (see e.g. Riles, 2011), such an analysis of magistrates' court procedures is a novel application of a provocative social theory (Sayes, 2014) as part of the methodology. It became clear that a purely thematic analysis of the data would not adequately account for the complexities contained in that data. We have, therefore employed a post humanist technique of analysis in an attempt to 'make explicit what is implicit in our ordinary social know-how' (Critchley, 2002: 7) and to avoid passing over that which we already know in our day-to-day lives. We therefore suggest that using this framework allows us to understand the significance of the data and move it into discussion about how power is diffused and perpetuated through apparently benign, everyday processes that have previously been considered representational rather than active.

### **The use of forms**

There were a total of 220 references to forms across the 183 cases that were observed. Advocates or the court regularly referred to 16 different types of form either overtly or indirectly.<sup>13</sup> All but 49 of those 220 references were made in implicit terms.<sup>14</sup> This demonstrates that forms operate to regulate the behaviour of the workgroup, without necessarily directly involving the person who is actually subject to the proceedings, i.e. the defendant. The observations suggest that the most frequent explicit references to forms involve CMFs, which are described above. As previously indicated, the advocates are required to record the matters that are in dispute and evidential requirements and then fix a trial date accordingly.

A number of interviewees (eight of 19) confirmed that the way that forms are used in magistrates' courts has changed in the second decade of the twenty-first century, and tended to suggest that they were obliged to fill in more forms. For example, interviewee N (a prosecutor) said 'There are an awful lot of forms now' while interviewee J (another prosecutor) said 'we seem to have more forms than ever before

... it seems that you can't do anything in a court room without having to fill in a form'. Defence lawyers also noted that the use of forms had increased, in particular interviewees F and I, who said in response to being asked about forms, 'there's certainly more of them'. This suggests that criminal justice has indeed been subject to measures which attempt to maximise and monitor efficiency via the use of forms. The form that was most frequently referred to by all interviewees was also the CMF.

### *The data in relation to standardisation*

While six of seven prosecutors interviewed felt that case management is useful to focus the issues in the case, only three defence advocates expressed a similar view. Defence advocates seemed to be more likely to express the view that case management removes discretion and becomes routine. For example, interviewee K said

I always taunted them that they often forget that there's a 'J' in there and what does that stand for and you know, they're so obsessed with this bureaucratic machine and moving it on ... It [CJ: SSS] made the thing less case sensitive and it was very much a one size fits all mentality

Interviewees B, E, F, K and H (the only prosecutor of these five) expressed the opinion that, as an example of rigidity and in a desire to process cases expeditiously, too many issues are reduced to 'yes' or 'no' answers on standardised forms. For example, interviewee B said that CMFs 'can be very helpful but ... sometimes I don't think it contains enough information, a little bit too much of it is tick boxes' while interviewee K said 'everyone's got to fill in a form; everyone's got to tick a box to be audited and assessed to why you did that.' As such, the form is, at the very least, entangled in the wider auditing process and helps determine the parameters of (dis)trust in the legal profession. In a similar vein, Interviewee I indicated that advocates are 'much more constrained by what they're supposed to do, there's much less leeway [to] just do what's in your client's interests'. Interviewee K went on to describe

efficiency drives as faceless bureaucracy which removed professional discretion and was ‘unnecessary other than to...crank up the speed machine.’

These comments support Brenneis’ view that the way that the forms are produced provides ‘frameworks for guided response’ (2006: 49), making it possible to detect a further move towards standardised procedures. Demands for standardised procedures can be associated with the need to process cases quickly. As interviewee G noted ‘the system really is being forced through ... for the sake of expediency as opposed to justice.’ It appears, therefore, that practitioners view the two concepts (expediency/efficiency and justice) as diametrically opposed. The reflection of a ‘one size fits all mentality’ in relation to speed and efficiency offers a profound example of the means by which forms differentiate between a sense of temporal rationality and irrationality which determines what defines an agreeable defendant, and defines acceptable avenues of contest in the adversarial process.

CMFs have both administrative and legal roles in summary criminal courts. As noted above, they require the parties to state the matters that are in dispute, the witness requirements (and reasons why witnesses are required), any further evidence to be served and any legal argument that is envisaged. The forms invite the parties to determine which issues will be argued at trial, seemingly to ensure that court time is being used efficiently. Several interviewees, both prosecuting and defending, made comments which suggested that CMFs also helped them to use their time more efficiently. This was true of those who also indicated that they felt the form condensed information too much, betraying the conflict inherent in pitching efficient justice against individualised forms of justice. For example, interviewee S said that CMFs are ‘helpful because you know exactly what you’re looking for when you go to the form’ which suggests that it helped this defence lawyer to behave more efficiently. Interviewee I also indicated that the forms do help to manage court time while interviewee E indicated that the need to complete the form itself can create another layer of time pressure. Thus the form may create early demands on defence lawyers’ time but could assist efficiency at later stages in a case. The forms also allow Crown prosecutors to focus time and resources only on those matters that are disputed, thus avoiding ‘ambush’ by the defence on the day of trial.<sup>15</sup> This provides further explanation for the differing attitudes to the CMF in

that different actors have different experiences of time poverty, which has the capacity to affect the meaning of justice.

Newman also noted that, by focusing on a need to be efficient and meet targets, clients are often offered standardised services. One of his interviewees commented ‘There’s no time for access to justice...the client loses out in the need to get through the list’ (2013: 96). The standardisation that follows ‘entails that both action and speed are utilised to undermine individual identity’ (*ibid.*: 98). Interviewees acknowledged a tendency to standardise responses on CMFs. Interviewee A indicated that lawyers get used to completing the forms very quickly. That familiarity is likely to lead to routinization, which was acknowledged by interviewees E and F (both defence lawyers) who said ‘I think that any form that has got tick boxes on it is liable to become just a routine form ... So it just becomes a matter of routine and doesn’t really help’. One prosecutor acknowledged that the way the form is constructed created a risk that issues could be condensed too much, even though he expressed the view that the forms were useful overall. These issues undermine what we would consider ‘balance’ in the criminal justice process, that is, the ability of defendants to actively participate in the adversarial process. The interviewees’ comments imply that the form participates in an active process of increasing the speed of the proceedings. We argue that this positions the defendant in a particular way – more as someone to whom justice is done, and further away from an active participant with a role to play.

The completion of CMFs represents a particularly important entanglement of bureaucratic techniques designed to ensure consistency and efficiency in the process of defining law and justice, and provides an example of standardisation as questions are reduced to a series of tick box answers with limited space to explain the issues. For example, Interviewee O also expressed the view that ‘it’s purely tick boxes at the moment...it’s just so bureaucratic.’ This provides an illustration of how the entanglement of the form in the processing and progressing of cases dehumanises defendants, whose cases are all managed subject to the same procedures even though they are likely to involve different issues and defendants are likely to have different priorities. Routinization techniques, then, help rescue professionals from a degree of

time poverty arising from large caseloads that are encouraged by fee-per-case payment schemes. However, at one and the same time, standardisation and bureaucracy are both a plucky solution to a particular problem and also a problem maker, not least because of the inequity inherent in routinization.

### *Narrowing the legal issues*

Observations suggested that lawyers tend to make implicit reference to particular points of law during the course of case management. The entanglement of CMFs in this process, therefore, also represent one way that law has come to be mediated and expressed in magistrates' court proceedings. Case management hearings have evolved from Narey's (1997) suggestion that pre-trial review hearings may alleviate the volume of ineffective trial listings that occurred in magistrates' courts. Subsequently, in his review of the criminal justice system, Auld (2001) expressed concern about the number of pre-trial reviews that occurred, and believed that the parties should take a more co-operative approach to case management. As previously discussed, CMFs are thus part of the executive's desire to increase efficiency under the Criminal Procedure Rules. CMFs do also, however, have a role in potential legal argument about how evidential burdens are discharged and whether it would be just for trials to proceed.

The answers provided on CMFs about the issues in the case can be used as evidence during the course of a trial as implied admissions to particular elements constituting an offence, such as presence at the scene.<sup>16</sup> Interviewee E commented that he would be expected to assimilate huge amounts of information very quickly in order to complete a CMF, about which his client could be cross-examined during the trial. Relatedly, about half of defence advocates and half of prosecutors interviewed felt that legal knowledge is necessary to complete a CMF appropriately, both in relation to the nature of the charge and the evidential burdens which the Crown must satisfy to prove its case. The majority of interviewees, particularly defence advocates, appeared to be acutely aware of the fact that what is recorded on the CMF could be referred to during subsequent hearings, and indicated that this led them to consider completion of the form very carefully. For example, interviewee S said 'you know full well that if you put something on that CMF it could be used against your client at trial', while interviewee I said 'the

thing is with the CMF obviously now they can be admitted as evidence if someone changes their version of events'. Interviewee A went further in describing being 'tied' to what was written on a CMF as if it were similar to an interview under caution. This highlights the extremely problematic way that forms can shape legal process, but without passing through the democratic processes that apply to enacting legislation. It also highlights some of the contradictions inherent in document completion – a desire to complete the form appropriately while also suggesting (above) that the form is not fit for purpose because it standardises issues too much. In contrast, Soubise (2017) identified that some prosecutors felt that lawyers responsible for charging decisions did not complete CMFs properly,<sup>17</sup> which is perhaps another example of differing experiences of time poverty.

As indicated above, it was apparent that lawyers were conscious that the answers that they record on CMFs might also be challenged by the court. For example, Interviewee O expressed annoyance that his assessment about the need for witness attendance at trial would likely be challenged by the court, which simply wanted the trial to conclude as swiftly as possible. He appeared to think that such challenges undermined his autonomous decision making abilities when he stated 'you're a professional and you should be treated as one who is competent' to make decisions about how cases are conducted. The means by which the form enacts this problem is, of course, also heavily reliant on the environment to which it relates, and in which it circulates. For instance, the fixed fee payment structure of publicly funded criminal defence work exacerbates the issues identified by interviewees as lawyers are disincentivised from spending a significant degree of time examining the fine details of any given case. The implications of this are obvious; relevant evidential or legal points may not be pursued, especially as CMFs confine responses to generic or limited answers—this is all the form anticipates and allows. The court has a strong interest in efficiency, which is performed via points of closure that delimit the contested issues during the course of case management. Any attempt to move outside those boundaries may be challenged by the court. By inference, what is recorded on the form determines what types of issues are considered appropriate for contest, which operates in such a way that it appears to have an effect of delimiting how justice is constructed and, therefore, how law develops. By implication, these measures create further barriers to active defendant participation in the process because the form is complicit in the enactment



of a temporality which redefines and restricts what is understood as justice in summary criminal proceedings.

All of the above is not, however, to say that defendants would necessarily prefer the proceedings to be conducted at a slower pace. Indeed, Sharma (2014) encourages the moral value associated with time to move beyond the linear critique of speed–slowness as speed can be both a positive and negative attribute of a particular temporal experience. Moreover, peoples’ experiences of time have the tendency to intersect and diverge in unanticipated ways (Munn, 1992). Bottoms and McClean (1976) noted that many defendants seek swift case conclusion for a number of reasons, including issues with employment, the trouble of attending court and the anxiety it causes. There is, therefore, a balance to be struck between the swift conclusion of cases and enabling defendants to be included in the process while also protecting their rights. As such, rather than critiquing speed itself, it is important to exemplify how imbalances which operate in a particular system result from differing degrees of access to the prevailing and rationalized temporal disposition. In other words, the intelligibility of the form (and the requirement of specialist legal and professional knowledge in order to complete it accurately) helps enact the comparable weakness and vulnerability of a defendant in proceedings. The availability of certain temporal infrastructures to some and not to others enables a distinction to be drawn between those who have stabilised access to the rationalized temporality and those who do not relate to it from a position of privilege.

Stability may, nevertheless, be a dubious and equivocal privilege. Bourdieu (1990) noted that routinized practices are also important in encouraging stability within workgroups. Thus, the form’s tendency to enact standardised procedures becomes important to the habitus which prescribes the framework—in this instance temporal—for a particular group and helps determine the sense of appropriate actions to take in particular circumstances. As such, the form may be a way of ensuring that policy initiatives (based on managerial principles) become integrated in the habitus, and the use of forms may be seen as one of the practices within neoliberal techniques of governance designed to encourage efficiency. As

such, lawyers become implicated in processing particular understandings of justice. There are, however, competing agendas to the working practices in the criminal justice system. The adversarial nature of the process—even when undermined by bureaucratic procedures—means that defence advocates and prosecutors assume different roles, which may explain why defence advocates in particular raised concerns about the routinization of proceedings (particularly case management) during the empirical research. The transformative and stabilizing effect that the standardised form has on justice—dutifully meeting the language of efficiency, expediency, and clarity—reduces the attentiveness one might expect of criminal justice. Standardised forms are, therefore, heavily complicit in this regeneration of criminal justice.

### **Analysing the creative capacity of forms: enacting justice**

Post-humanist approaches to any object of research seek to examine the situatedness of the human experience to non-human environments. The principal concern of new materialism, for instance, is in identifying the physical conditions and experiences which have an impact on our social lives. The suggestion advanced by new materialists is that the human is indebted to and limited by, rather than a master of, its surroundings (Orlie, 2010). The concern with acknowledging this indebtedness is set against the social sciences' perceived neglect of the everyday conditions which produce our lives (Conaghan, 2013). New materialism does, however, appreciate that *exclusive* focus on either representations and discourse, on the one hand, or the corporeal, on the other hand, is also unhelpful and seeks to blur categorical distinctions between matter, language, the human, and the non-human (Bennett, 2010). For instance, linguistics are not imbued with a logic independent from material form, nor can matter be liberated from language. They each have permeable frontiers and are messily related by way of ascription and affect. The CMF acts as an excellent example of the interplay between textuality and materiality.

An emphasis on exploring particular networks, without *privileging* certain (human or ideological) actors within networks, in order to determine how they work welcomes criticism that such an approach fails to

properly account for existing imbalances between actors within a network (Philippopoulos-Mihalopoulos, 2015). Such criticism does not take into account the potential to use descriptive approaches to trace what has enabled particular networks to give effect to power imbalances (Corrigan and Mills, 2012). Indeed, the ability to identify how imbalances are reproduced in summary criminal proceedings, and how non-human objects are entangled in this production, has been drawn out in the interview data gathered.

In this respect, post-humanist approaches can be considered a collection of heuristic devices which set off ‘in the first instance by thinking about the power to do things, the “power to” that grows out of ... webby relations and practices’ (Law and Singleton, 2013: 493). Addressing the conditionality of power and ideology on networks of relationships among diverse actors is nonessentialist, certainly, but this only serves to demonstrate its potential to explain how certain things come to have the ‘power to’ act. For instance, this paper seeks to address how neoliberal governments’ distrust of public services creates a particular brand of criminal justice, but also how this belief comes to be made operative and sustained. The importance of standardisation—and the role forms play here—for enabling the power *to* enact a particular approach to justice should not go unexplored.

An exploration of the participation of forms offers an excellent means for exemplifying this and underscoring the benefits of an approach which acknowledges the productive capacities of objects (see e.g. Fenwick and Edwards, 2010). The participation of ostensibly passive, or representative, objects such as forms in the production of something as ethereal as, for instance, justice is accounted for on the basis of understanding how its agency, or ‘thingness’ is a product of intra-action (Barad, 2007). Thus, rather than agency being considered as a prerogative of the human, agency can be thought of as the consequence of collective and relational efforts among a number of disparate sources. In other words, the form can be implicated in generating meaning given to the definition of such things as the defendant, the defence, the prosecution, and the court—in addition to the levels of support and deservingness attributed to each.

This approach is shared by ANT too, and the vocabulary which identifies the value in examining the entanglement of disparate actors in the process of enacting ‘things’ as they are (see e.g. Latour, 2005). If ‘justice’ is identified as being similarly situated and contingent, something as banal as the circulation of a standardised form within summary criminal proceedings can also be implicated in the everyday materialisation of a particular ideological approach to justice. Moreover, the form can be thought of as a device entangled in a contingency–creativity relationship with its environment. Forms are contingent because they depend on the environment they operate in and creative because they are equally implicated in the shaping of it (de Laet, 2000). The critical value in examining the form (as a standardising actor) is evident, given that the ‘privileges of setting standards are intrinsically linked to social power relations in modern society’ (Lengwiler, 2009: 96). We now turn our attention to how the form enables the production of a particular temporality which privileges certain attitudes, enables the rationalisation of a particular approach, and sustains a problematic ideological disposition to summary criminal justice. Furthermore, it also offers an indication of how the use of approaches such as ANT enables us to account for pre-existing imbalances that *appear* to be fully operative between actors in a network but are actually brought into being *within* the network.

### **Efficiency, standardisation, and rationalisation: enacting temporal classes**

Acknowledging the existence of multiple temporalities invites an interrogation of the means by which a *particular* temporality is rationalized and co-opted as universal and verifiable time.<sup>18</sup> Moreover, the rationalization of a particular temporality suggests the corresponding unfavourability to other temporal experiences. The implication of a powerful determination of ‘time’ in the determination of right from wrong, included from excluded, or just from unjust is most keenly demonstrated by Sharma, who acknowledges the situatedness of what we understand to be ‘time’ in her notion of temporally informed class distinctions. In making a distinction between the temporality of businesspeople, holiday makers, and consumers, on the one hand, and that of taxi drivers and service people, on the other hand, Sharma

(2014) suggests that certain classes of people have their temporality performed, sustained, and protected by the more precarious temporalities of others.

Such anxious temporalities are a consequence of the lack of ‘time maintenance infrastructure to support their time needs and to help keep things in order’ (*ibid.*: 74). In other words, precarious temporalities are enacted by the absence of equally available time rationalizing technologies in the performance of different valued temporalities. Here, an ethical position emerges which rejects the grand, linear, and universalizing assumptions about time, critiquing the notion that it is ‘something to which we all have equal access’ (*ibid.*: 133). The idea that time is evenly, linearly, and universally available or applicable is apparent to us only because it has been aggressively veiled as such (Scott, 2014). Such understandings of time are dependent on material processes (Birth, 2012), meaning that it is both possible and important to identify that the social construction of particular temporal classes which sustain particular social orders and powers is achieved through the materialisation of time as an, ostensibly, fixed truth (Davies, 2001).

The deployment of a *particular* temporal truth against other irrationalisable temporalities can effect a problematic disposition towards criminal justice. Routinization, for instance, appears as both a by-product of the demand for efficiency and as a means of sustaining a commitment to efficiency *as* justice. McConville *et al* (1994) suggested that, because lawyers in criminal courts share similar crime control values, they tend to routinize procedures and therefore deliver standardised services. Such processes are not purely based in shared ideological assumptions but are also enacted by the practices which increase the speed of summary criminal process, as illustrated by the data described above.

Further, and of particular relevance to the local context inherent in this ethnographic work, familiarity and co-operation among a workgroup is also likely to lead to routinized practices (Young, 2013). Again, such analyses are borne out by the data in relation to the CMF. In other words, if McConville *et al* (1994) were correct to say that lawyers standardise services due to a dearth of sincere commitment to the client’s

case, things can only have been made worse by the adoption of managerial techniques, embodied and insisted on by the use of the form, since their study. As Garland (2002) notes, management measures are designed to limit professional discretion and closely regulate working practices, such that they become standardised, and such standardisation is encouraged by the use of forms.

While some standardisation may be appropriate when matters are uncontested, we argue that the form takes a central role in the process of determining which issues are capable of standardisation. Manifesting such weight in non-human actors (further) relegates autonomous, individualised professional decision making practices, which Tata (2017) argues are central to traditional conceptions of criminal justice, to unwanted distractions away from the issues which are deemed significant by their very inclusion on the form. Thus the form operates to undermine individualised types of case progression that would be advocated for in a traditional adversarial process, and further challenge the ability of lawyers to actively defend their clients. At the same time, the form is a highly politicised document on which the inclusion of particular issues is based on assumptions about what is 'just', but without meaningful consultation with the workgroup or defendants.

The routinization that follows is also materially contingent. The notion that material and environmental conditions *temporalize* time (Hodges, 2008) is closely related to the post-humanist insistence on identifying the productive role played by non-human actors in the conditioning of our everyday existence. An element of post-humanism is to emphasize the fluid, dispersed, and contingent subjectivity of every enacted agency, which enables the 'now' to be re-determined by the entanglement of actors and states of affairs which are continually evolving. Technical and technological developments, for instance, shift our relationship to time and can help redefine institutional temporalities (Southerton, 2003) which pursues and rewards efficiency, speed, and quantity in criminal proceedings. The form is one such development which can be identified as enacting and maintaining the temporality of this species of justice.

## Conclusion

Research has consistently demonstrated that, at least since the mid-1980s, demands for efficiency in summary criminal courts have increased. Balanced against those demands is an acknowledgement that magistrates' courts have historically, and continue, to operate with voluminous caseloads.

Demands for greater efficiency in summary criminal courts place greater emphasis on speed over just processes, and encourage ever greater degrees of co-operation between the parties. Both of these factors serve to promote the provision of routine and standardised services, which are manifested by the court's requirement that trial procedures must adhere to those issues recorded on CMFs. As such, the form is identifiable as a participating actor in the production of a temporality which privileges positive dispositions towards speed and efficiency. Consequently, traditional adversarial approaches to summary justice are undermined by assembly line stylised case progression, during which decisions about justice are 'rubber stamped' (see e.g. Marsh, 2016; Soubise, 2017). It is via such mechanisms that bureaucracy (to which processes of documentary form completion are integral) allows the state to exercise some control over the functions of publicly funded institutions (Murphy, 2009). Such bureaucratisation and standardisation has the effect of undermining individual rights in favour of speed, thus creating a temporally situated, and limited, understanding of justice.

These factors significantly (further) undermine the ability of defence lawyers to provide individualised services to defendants, which damages the rhetoric of justice. While Baldwin and McConville stated that the injustices they saw essentially resulted from a system that 'too often sacrifices the needs of the individual to the requirements of bureaucratic efficiency' (1977: 115), we argue that the work of forms (as a manifestation of the government's demand to increase efficiency) has exacerbated the problem by significant degrees, not least because they are entangled in the process of effecting a new, temporally situated, characterization of justice that prioritizes expedition over qualitative detail. Along with the culture of workgroup co-operation, specialised use of language, and technical decision making processes, the temporality generated in the circulation and participation of the form in summary criminal

proceedings operates to further exclude defendants from active participation in the proceedings. It would be a mistake to underestimate the (at first glance, benign) role of the documentary form in these processes.

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## **Notes**

<sup>1</sup> Summary criminal cases are those which are dealt with only in the magistrates' courts (the lowest tier of the court system) and, generally speaking, carry a maximum penalty of six months' imprisonment.

<sup>2</sup> An example CMF can be found online, at <http://www.justice.gov.uk/courts/procedure/criminal/docs/2010/crim-pr-part-3-magistrates-courts-preparation-for-trial-form-aug-2010.pdf> (Accessed 16 October 2017)

<sup>3</sup> Neoliberalism is, in this context, understood as a complex and often contradictory set of political practices that tend to favour managerialism in public institutions (Peck, 2010), and therefore demand greater efficiency at reduced cost.

<sup>4</sup> It is important to note here that there is an essential distinction to be made between suggesting that the form has agency and suggesting that the form is sentient. We suggest that the ways in which the actors interact with the form imbue it with a particular role which makes it active in the proceedings. Essentially, we are discussing a dehumanisation of process.



<sup>5</sup> Latour (see e.g. 2005, 2012) express the importance of acknowledging the relational enactment of agency, contingent on both human and non-human actors.

<sup>6</sup> Such speed denies defendants the opportunity to understand the proceedings and consequently does not necessarily persuade them that just procedures are followed (Carlen, 1976a).

<sup>7</sup> Department for Constitutional Affairs 'Delivering Simple, Speedy, Summary Justice' (2006).

Available at:

[http://webarchive.nationalarchives.gov.uk/+/http://www.dca.gov.uk/publications/reports\\_reviews/delivering-simple-speedy.pdf](http://webarchive.nationalarchives.gov.uk/+/http://www.dca.gov.uk/publications/reports_reviews/delivering-simple-speedy.pdf)

<sup>8</sup> Ministry of Justice 'Swift and Sure Justice: the Government's Plans for Reform of the Criminal Justice System' (2012) Available at <https://www.gov.uk/government/publications/swift-and-sure-justice>

<sup>9</sup> Here, the geographical area that was researched was a Criminal Justice Area (as designated by the Ministry of Justice) consisting of four magistrates' courts in south east England.

<sup>10</sup> The implications for research design included how interview participants were selected. For example, a conscious decision was made not to interview lawyers who were then employed within the same firm as it was felt that the ethical risks (such as familiarity with the firm's procedures and client matters, the potential to upset day-to-day working relationships and highlight/undermine working practices) would negatively influence data collection and analysis. It should further be noted here that the empirical research was conducted as part of Welsh's PhD study; Welsh, L (2016) *Magistrates, managerialism and marginalisation: neoliberalism and access to justice*. Doctoral thesis (PhD), University of Kent. The paper presents previously unpublished data and employs a different analytical frame through which to view the data.

<sup>11</sup> The definition of this role is taken from Bryman (2012), in that Welsh was (at that time) a participant in the groups' core activities (i.e. a defence solicitor practising in the same courts she was observing) but was not involved in the cases observed. Welsh practised as a defence solicitor for 10 years, and worked in the criminal justice system for 13 years up to 2015.

<sup>12</sup> All 35 defence lawyers and all 18 Crown prosecutors based in the area at the time to whom (bar Welsh's own colleagues – a further five solicitors) were invited to participate by letter and those interviewed were those who responded positively to that enquiry in the form of voluntary and informed consensual participation. We accept that this will not necessarily be a representative sample and will provide indicative rather than generalisable findings.

<sup>13</sup> Examples include bail notices, police prepared case summaries, CMFs, sentencing reasons forms, trial reasons forms, means forms, cracked/ineffective trial forms, interpreter's timesheets, legal aid applications, form certifying committal procedures, bad character and hearsay applications.

<sup>14</sup> We have taken implicit references to mean when it is clear that a form will be used but it is not actually referred to during proceedings.

<sup>15</sup> See comments made in *DPP –v- Chorley Justices and Andrew Forrest* [2006] EWHC 1795; *Malcolm-v- DPP* (2007) EWHC 363 (Admin)

<sup>16</sup> This practice is discouraged following the judgement given in *R –v- Newell* [2012] EWCA Crim 650 but xxx has observed prosecutors putting the content of CMFs to defendants in cross examination.

<sup>17</sup> We acknowledge such practices may represent resistance, or points of rupture in relation, to the aim with which the form was produced but we are concerned to demonstrate what the form represents in terms of a technique of governance. Further, data on how advocates might resist standardisation by, for example, refusing or omitting to complete particular parts of the form was not gathered in interview for the methodological reasons stated above. Observation (and the researcher's own experience) did, however suggest, that such acts of outright resistance were rarely performed, which is perhaps symptomatic of the strongly co-operative workgroup culture that often exists in magistrates' courts (see, for example, Young (2013); Carlen, (1976))

<sup>18</sup> The distinction one can make between 'time' and 'temporality' is not prominent in this paper. Rather, 'time' is used in this paper to identify and problematise the notion of universality and taken-for-grantedness whereas the notion of multiple 'temporalities' enables us to appreciate one's knowledge of time as contingent on experience.

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